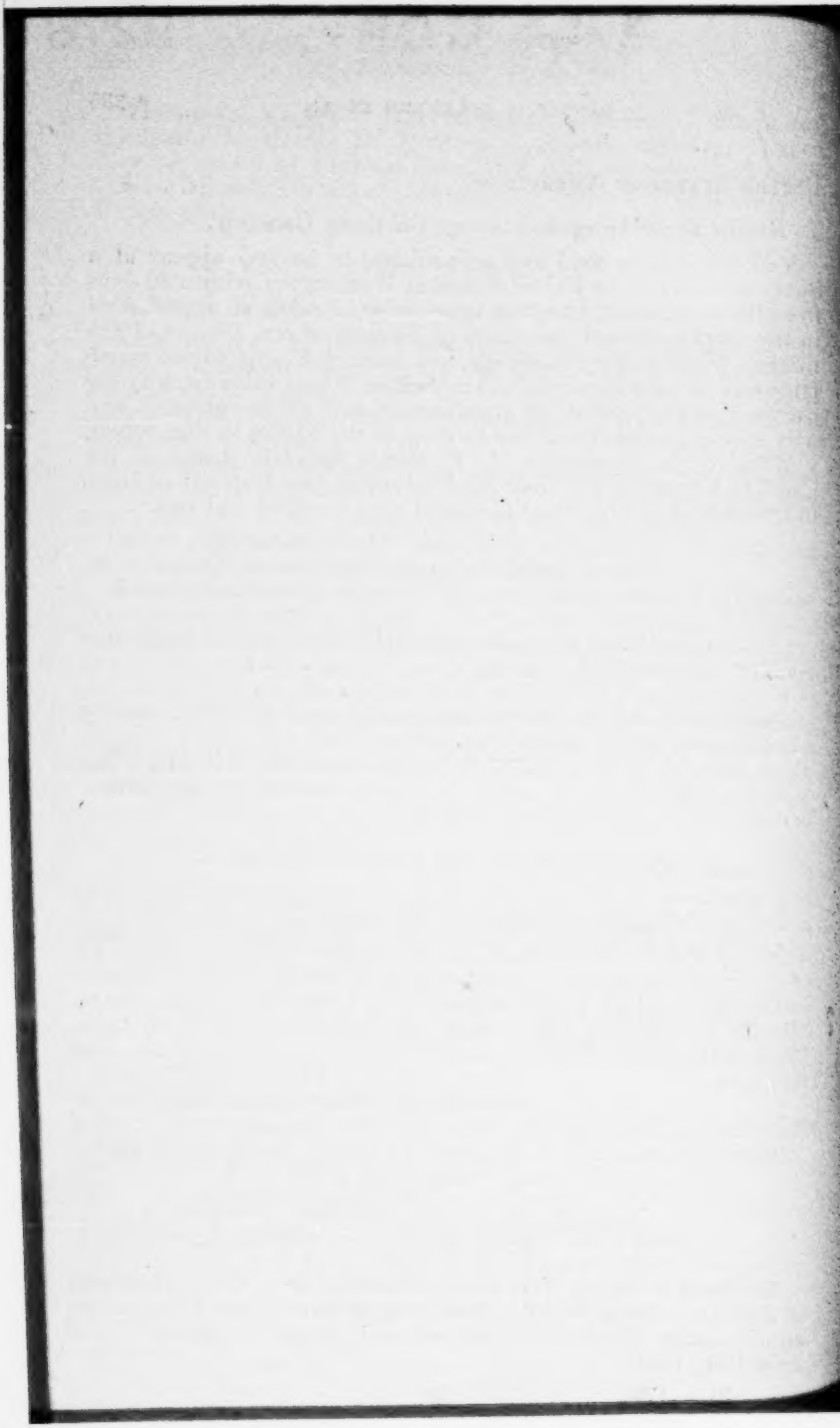


IN THE

Supreme Court of the United States,

OCTOBER TERM 1903.

NO. 87.

MARY SHAPPIRIO AND JACOB I. SHAPPIRIO,
APPELLANTS,

vs.

MINNIE D. GOLDBERG AND GEORGE GOLDBERG.

BRIEF FOR APPELLANTS.

Statement of Case.

The appellee George Goldberg on February 6, 1879, acquired the south 34 feet of lot 28 in square 977 situate in the District of Columbia fee simple; and in 1893 he purchased the possessory title to all that part of lot 2 lying immediately in the rear of lot 28 and the same was from that date occupied by said Goldberg as one property (Rec., p. 51).

He first built a store on the south part of lot 28 (No. 1247 Eleventh street, southeast), and used the side lot (now No. 1245 Eleventh street) for a yard. In the fall of 1892 he built the store 1245 and in the summer of 1893, having purchased the part of lot 2 at the rear of said lot 28 aforesaid, from John N. Gates built the stable now upon said lot and rented same with store 1247 to one Nally, who occupied it for about three years, and from that time the

whole property was occupied by the defendant George Goldberg until May, 1901.

About a month prior to May 11, 1900, L. Richold, a real estate broker, while passing the defendant's, George Goldberg's, place, 1245 and 1247 Eleventh street, S. E., saw said Goldberg with whom he is well acquainted, and Goldberg told him he wanted to sell the property (~~Goldberg~~ Richold Dep., Rec., pp. 3 and ~~101~~ 8); Richold inquired the price and was told by Goldberg he would sell for $7,000; saying the property would rent for $70 per month; Richold then made a memoranda, in a small book, of the description of the property as given by Goldberg. Sometime after that Richold saw Shappirio and called his attention to the property; on a Sunday prior to May 11, Richold and Shappirio went to inspect same; Goldberg took them through the stores, out into the back yard, and pointed out the stables to Shappirio. On the next day, or between that date and the 11th of May, Shappirio requested Thomas F. Galloway, a builder, to go with him to inspect the property and advise him of the value of same. Shappirio and Galloway went to see the property, and on reaching there Goldberg introduced them to his brother-in-law, Isaac Roginski, then took them to the back of the building and stood in the door of a small kitchen attached to the rear of 1247, looking out upon the property in question, and while so situated he told his brother-in-law, Isaac Roginski, to show them through the property and he did so, taking them through the stable of 1247 out in the alley, then from the alley into the stable of 1245 and then back into the yard (the yard to both houses being in one, with no division of any kind), where they found Goldberg still standing in the rear door of said summer kitchen. He then directed his brother-in-law to take them through the upper part of the premises, which he did. When leaving Shappirio said he would

see the agent Richold and would probably purchase the property. Goldberg told him it was a great bargain and urged him to buy. Shappirio saw Richold and offered $6,000 for the property. Richold went to Goldberg and submitted the offer and Goldberg accepted it and gave him authority to sell (Rec., p. 48). Richold then, as Goldberg's agent, accepted a deposit of $100 from Shappirio and supposed he was selling the whole of the property as covered by the premises pointed out. Richold ordered the examination of the title and preparation of the deed, and on the 5th day of June, 1900, said George Goldberg and wife made a deed of special warranty to Mary Shappirio, the wife of Jacob I. Shappirio, *but the property described in said deed did not include the back yard of 1247 or the frame stable thereon or any part of the same.* The authority to sell on its face called for the premises 1245 and 1247 Eleventh street, S. E. Lot 34 feet front by 80 to an alley. This necessarily carries everything connected with the premises; but if taken as 34 x 80, it should contain 2,720 square feet of land. While the amount conveyed is only 2,360 square feet.

Goldberg rented the property from Shappirio at $50 per month until May 6, 1901, and while Shappirio's tenant, in October, 1900, he hunted out one Rufus A. Darby, who claimed to own the proprietary or record title to said part of lot 2, *the back yard and upon which the stable of No. 1247 is located,* and obtained a deed from him purporting to convey said part of lot 2 to his (Goldberg's) wife, Minnie D.

Some time after this Shappirio heard rumors to the effect that said part of *lot 2, or the back yard and stable to 1247* was yet claimed by Goldberg. Supposing that they were mere rumors he made no investigation until shortly before filing this suit, when he learned that the deed did not contain all the property he had been shown and which he supposed he was buying. Soon after that *Goldberg built a fence around*

the yard of 1247, inclosing the small piece of lot at the rear of lot 28 and completely cutting off the yard, stable and outlet, at the alley in the rear of premises 1247; the fence being built so close to the back of the main building as to close up the door and blinds (See Ex. Phot. E). A day or so after that—May 6th—Goldberg moved out and left the property in that condition. The next day after Goldberg moved out the full condition of the matter was discovered, and on May 10th this suit was filed.

The defendant made answer, under oath, denying every material allegation in the bill. Answer under oath however was waived and therefore stands as if not sworn to, in so far as it has any weight as evidence in favor of the appellees.

The case came on for hearing upon the pleadings and proofs on the 5th day of December, 1901, and on December 10, 1901, the court passed a decree dismissing the bill, from which decree the appellants, complainants to the bill, appealed to the Court of Appeals of the District of Columbia, and on hearing before that court the decree was affirmed and an appeal taken to this Court.

Errors.

1st. The Court of Appeals erred in not reversing the decree of the Supreme Court of the District of Columbia and in not remanding the case with directions to enter decree reforming the deed made by the appellees (Rec., p. 49) so as to conform to the land designated and pointed out, at the time of the negotiating of the sale to the appellants and as described in the authority to sell (Rec., p. 48), to wit, the piece of land 34 feet front by 80 feet deep to an alley, as prayed in the bill.

2nd. The Court of Appeals erred in not reversing the decree of the Supreme Court of the District of Columbia and

in not remanding the cause with directions that the appellees be required to convey the land they agred to sell to the appellant and thereby fulfilling their contract of sale.

3rd. The Court of Appeals having found that the appellant's were deceived and misled by the situation of the property and the silence of the appellees, erred in not reversing the decree of the Supreme Court of the District of Columbia and in not remanding the cause with directions that the sale made to the appellants be rescinded, according to the prayer for alternative relief.

4th. The Court of Appeals erred in not reversing the decree of the Supreme Court of the District of Columbia and in not remanding the cause with directions that the sale to the appellant, Mary A. Shappirio, be vacated and annulled and the appellee, George Goldberg, required to refund her, Mary A. Shappirio, the amount paid to him for the property, as asked by the prayer for alternative relief.

Argument.

Notwithstanding that two Courts have passed upon the facts (the appellate court having found fraud to exist in the case) this Court will examine into the record and if it finds the conclusion wholly unwarranted by the testimony, it will reverse the lower court.

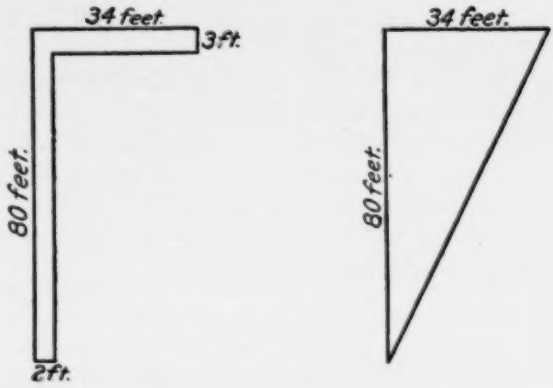
Beyer *vs.* La Fevre, 186 U. S., 114, 119.

Points on the Opinion of the Court Below.

I desire to call the Court's attention briefly to some remarks in the opinion of the court below, which begins on page 227 of the record. On page 228, the court says that the description of the premises covered is in exact conformity as to the front and depth of the lot, and to the description of the property authorized to be sold and which

was contained in the contract of sale and purchase, signed by all the parties concerned.

I submit, by no possible reason can such be the case, for the authority to sell, described the land as 34 feet front by 80 feet to an alley, and if the land conveyed is 34 by 80, then a tract of land as indicated by the following cuts would be likewise :



A piece of land 34 by 80 feet contains 2,720 square feet, while the land conveyed by the deed (Rec., p. 49) contains only 2,360 square feet. A piece of land 34 by 80 feet can be nothing more or less than a tract 34 feet one way and 80 feet another.

As I understand the language used in the authority to sell, 34 feet front by 80 feet to an alley (Rec. p. 48) the words "by 80" has the same meaning as if it had read "34 feet front and running back that width, 80 feet, to an alley." It seems to me it could mean nothing more or less. Certainly if a man sold me a stick of lumber 8 by 8, I would not expect to get one 8 inches on two sides and 1 inch on the other two.

The word "by" in a contract will be treated in the sense it was intended by the parties, as gathered from the surrounding circumstances, and is often used in place of "x" for abbreviation in giving the dimensions of any particular thing.

> "A bracket 3x5 is 3 feet by 5 feet or three feet on one side and five on the other."
>
> Jaqua *vs.* The Withram and Anderson Co., 106 Ind., 545.

> "The word 'by' or 'from' used to express boundaries are lines of exclusion, unless by necessary implication they are used in a different sense."
>
> Willis *vs.* Iron Co., 48 N. H., (see page 538), 11 N. H. 485, Ib. 520.

While the agreement of sale does not mention any other land than lot 28, yet it can be plainly seen that the parties intended buying all the land used and occupied by the premises. By the receipt for the purchase money (Rec., p. 12) the property is designated No. 145 and 1247 (should be 1245 and 1247); the court below says no other improvements are mentioned in the paper than the two brick stores.

Can it be contended that it is either customary or necessary to mention or describe the woodsheds and yard, to a piece of improved property, in giving a receipt for the earnest money?

In another part of the opinion (Rec., p. 228) the court suggested that the trustees under the deed of trust are not parties to the suit. If it had looked on page 11 of the Record, it would have noticed that by stipulation of the parties it was agreed that they not should be made parties. No question of the kind was ever suggested by the appellees in

either court below. If they desired to suggest want of proper parties, the trial court was the place to do it.

The Court says further:

"The apparent relation of the yard and shed in the rear of lot 28 to the front lot was such as well calculated to produce the impression from a mere inspection that they constituted part and parcel of the entire premises (Rec., 230). But the purchaser was bound, etc." How could he know when he had nothing to put him on his guard? And on the same page the Court said: "But we, nevertheless, think it probable that the plaintiffs, or rather Jacob I. Shappirio, was really deceived and mislead by appearances as to what in fact did constitute lot 28 purchased of Goldberg." Now, I submit, that under the authorities I shall quote, when the Court below found these facts, in order to relieve the appellees of the charge of fraud, it was imperative to find that they, the vendors, did everything in their power to avoid this deception and prevent the ~~customer~~ purchaser from being misled, and it is not conceded they did so in the slightest degree. The authorities cited by the court below to sustain its ruling have no bearing upon the case from any standpoint.

The court says it is conceded that Goldberg did not own the land, etc. (Rec., 230). In what way and how is it conceded? For what was all the evidence tending to show the possession of the Goldbergs and those under whom they claim?

The question as to whether a certain case is an authority on the question of fraud must be considered in the light of the surrounding circumstances in that particular case. In writing an opinion, where a question of fraud is involved, the court necessarily has in view the facts in that case, therefore an opinion based upon a state of facts in a case where the court fails to find fraud should not be a guid-

ance in one where fraud is found, but the court below did not follow this principle; for it will be seen that no fraudulent act or misrepresention was found to have been made in either case cited.

In the case of Staughton *vs.* Gleason, 13 Wall., 379, 383, cited, was a case where Staughton purchased a steamboat of Gleason. Staughton did not want a boat to draw more than 3½ feet of water. Gleason said he did not know, not being a boatman, just how much she drew. But before the contract of sale was made, Staughton, the purchaser took a ship carpenter with him to New York for the purpose of examining the boat and while there every opportunity was given him to make such examination, and he did examine it from one end to the other and the court found there was no fraud. Mr. Justice Field in delivering the opinion of the court said (page 385),

> "but justice to him (the vendor) requires us to say that the evidence is insufficient to warrant the conclusion of fraud, the vendor states he was not a steamboat man, evidently meaning from the context, that he was not familiar with the particulars, regarding to which the purchaser desired information and referred him to the captain, at the same time inviting him and his party to examine the boat in every particular. The measurement made by one of the carpenters showed that the boat drew 4.6 feet of water at midship, whilst lying unloaded at the dock."

How can such an authority where the charge of fraud was wholly disproved be applied to the case at bar? Compare the above case with what was said in the case of Stewart *vs.* Cattle Co., 128 U. S., 383, and Nesbit *vs.* McFarland, 91 U. S., 101, where fraud was found.

And now take the case of Atlantic Deland Co. *vs.* James,

94 U. S., 207 (the next case cited by the lower court), a suit alleging fraud in a stock transaction. In that case the court said (p. 210):

> "A careful and thorough examination of all the evidence submitted, fails to convince us that there was any substantial error in the statement or that it did not truly exhibit the condition standing and the account of the company when given."

So how can this case be considered an authority, when compared with the case at bar, where the court below said (Rec., p. 230): "*But nevertheless, we think it possible, that the plaintiffs or rather Jacob I. Shappirio, was really deceived and misled by appearances as to what in fact did constitute lot 28, purchased of Goldberg.*" Who deceived him? Did the good brown earth do so? Or did some individual? The learned Justice says (Rec., p. 230) "though Goldberg may not have made any positive representations, he was not required to do so." Why was he not? If the small part of lot 2 was not a part of the premises or the land meant to be sold, did he not deliberately conceal that fact and did he not fail absolutely, if such was the case, to inform the purchaser that it was not a part of the premises, while standing upon it and pointing out the stable on the lot." (Rec. p. 17.) Can it be said that it was not his duty to inform him if such was the case?

> "In a court of conscience, deliberate concealment is equivalent to deliberate falsehood."

Compare these words used by Mr. Chief Justice Waite in delivering the opinion of this Court in the case of Crosby *vs.* Buchanan, 23 Wall., 420, 450, with the opinion in this case and see Kerr on Fraud and Mistake, pages 101, 102.

Now take Crymes *vs.* Saunders, 93 U. S., 556, the next

case cited by the Court below In the very first part of the opinion we find the Court saying:

> "The record discloses no grounds for any imputation against him (the vendor). It was not claimed in the discussion of the case at bar, nor is it insisted in the printed ~~agreement~~ submitted by counsel for appellees, that there was on his part any misrepresentation, intentional or otherwise, or any indirection whatsoever. Nor has it been alleged that there was any intentional misrepresentation or purpose on the part of others."

In the above case the vendor owned two tracts of land and the purchaser went to look at them to ascertain the value as to supposed gold deposits. The vendor's son drove the purchaser and his attorney to the land to be sold; they arrived there after dark and remained in a small house on the property all night. The next morning in looking over the property they met a man, who after talking with them of the land sold, took them to an old abandoned shaft which they supposed was on the premises. The vendor did not know anything about the man who did this; he had nothing to do with him. And the court further said: "There was no material difference between the two tracts." On page 61, it also said, "The subsequent conduct of the appellees shows that the mistake had no effect upon their minds for a considerable period after the discovery and there seems to have been rather a pretext than anything else. Yet this case is cited as an authority in a case where the court found the purchaser really *deceived.*"

In the case of McLean *vs.* Clapp, 141 U. S., 429, one of the authority cited by the court below, was a case to rescind a sale of a store and stock of goods made in 1855; the consideration of which was four mortgage notes, aggregating $5,000.00; soon after the sale, one note was paid. The last

of the notes fell due in 1857. When this occurred, suit was brought to foreclose the mortgage, which was compromised in 1857 and other and different securities were given in lieu of the unpaid notes. In 1861 the vendor of the store became dissatisfied with his attorney, who had made the adjustment in the foreclosure suit, and discharged him, placing his business in the hands of another attorney, who notified the purchaser of the store and stock that his client repudiated the settlement made with the former attorney. But nothing was done until 1872, when suit was begun (11 years after) to set aside the settlement and foreclose the mortgage, which it seems had not been released of record, though it was understood and agreed that it was satisfied. And in that case, the court (having in mind the facts of the unusual delay) used the words set forth in the opinion of the court below. But the learned Judge below did not take into consideration that fifteen years had elapsed since the transaction complained of occurred, nor did he quote the following words used in that opinion, quoting Crymes *vs.* Saunders, *supra*, viz: "These remarks are peculiarly applicable to speculative property, like that in question, which is liable to large and constant fluctuation in value."

How this case can be applied to a case where the suit was brought within one year from the date of the first transaction, six months after the first rumor had reached the appellant's agent, and ten days after the true condition was found out, certainly the property involved is anything but speculative.

Compare this case with the case Pence *vs.* Langdon, 99 U.S., 578, and Dickerson *vs.* Patterson, 160 U. S., 584, foot of 591, where the court said: in the first case:

> "Acquiescence and waiver are always questions of fact. There can be neither without knowledge. The terms import this foundation for such action. One can-

not waive or acquiesce in a wrong while ignorant that it has been committed. CURRENT SUSPICION AND RUMOR ARE NOT ENOUGH. There must be knowledge of facts which will enable the party to take effectual action. Nothing short of this will do. *The wrongdoer cannot make extreme vigilance and promptitude conditions of recission.* It does *not lie in his mouth to complain of delay, unaccompanied by acts of ownership and by which he has not been affected.*"

The case of Southerland Development Co. *vs.* Silva, 125 U. S., the last case cited in the opinion by the lower court, was a question as to whether or not the fraud charged was established. The bill was answered under oath, and such not being waived it was held that the proof did not establish the charge of fraud. In the case at bar, though the answer is under oath, it was waived by the bill and cannot be deemed evidence for the defendant. The case last mentioned was a mining claim, the thing of the most interest to the purchaser was the value of the ore on the property, the parties fully investigated before buying and the court distinctly held that no fraud or misrepresentation had been made, so neither can this case be applied to the one at bar.

This completes the authorities cited to sustain the opinion of the court below, and I shall now refer to some of the facts to show that fraud and misrepresentations are manifest in this case.

The court further intimates that the appellants did not act promptly after discovering the fraud; but I respectfully submit, that a slight examination of the evidence in the case will show that the suit was begun within a few days after the true condition of affairs was known to them, and by the rules of law established by this court, they were not required to act until they were fully aware of the true situation and fully advised in the matter.

Points and Comments on the Evidence.

Many of the material allegations in the answer of the appellees are wholly and in fact admitted to be false by their own evidence. The bill charges that Mary Shappirio through her husband agreed to purchase the land mentioned in the statement of the case and that it should have been conveyed as described in paragraph 3 of the bill (Rec., p. 2).

That Goldberg had occupied the entire property for many years as described and that the same was all inclosed as one place. The transaction in relation to the transfer of title was left to Richold, Goldberg's agent. That they, the complainants, relied upon what had been told them about the quantity of the property. That they suspected no wrong and did not examine any of the papers.

The defendants under oath deny absolutely that George Goldberg built the frame building upon the back yard of property; saying a former owner built it (Rec., p. 9). The court's attention is specifically called to this, for the evidence shows beyond doubt that he did build said stable and this statement was made under oath, knowing it to be false.

Goldberg obtained the permit for building the stable himself and said he was the owner of it (Permit, Rec., p. 35).

Witness **Nally,** his tenant, says there was a yard about 30 feet deep when he rented the store premises 1247 (Rec., p. 24).

"I told him if I took the place I would have to have a place for my horses." He (Goldberg) got the man Selby to build it. Goldberg employed Selby to build it (Rec., p. 22). It was built for me. I used place as a stable" (Rec., p. 24).

Witness **Campbell** says (Rec., p. 178) his father, who kept a lumber yard adjoining the square in which this property

is located (Campbell's place can be seen from the photographs on file, Rec., p. 181), removed a bank of dirt from the piece of land in the spring of 1893 (Goldberg says likewise in his deposition, Rec., p. 204). That soon after that Goldberg came and told him to let the carpenter (who accompanied him) have the lumber. "It was rough lumber for a shed" (Rec., p. 179). "Goldberg paid for the lumber; I remember distinctly because he wanted a rebate on the bill."

> "It was paid to me (Rec., p. 179). I can swear that the lumber we furnished him was used by him to build a shed in the rear of his house. The house occupied him on Eleventh street at that time. The shed referred to was put there soon after the dirt was removed. I was there watching the erection of the building" (Rec., p. 181).

His wife, appellee Minnie D. Goldberg, not on information and belief, but positively swears to the same allegation as her husband. This shows her recklessness in taking an oath to something that she had no knowledge of. She did not marry Goldberg until 1896.

In the 10th paragraph of the answer they say:

> "The defendants specifically deny that said stable or shed or improvements was placed upon same (Pt. lot 2) by George Goldberg, but on the contrary it was built by a former owner."

The person they refer to as owner is John N. Gates, now deceased, who Goldberg paid $30 to for the possessory title which he (Gates) had in the property (Goldberg's Test., Rec., p. 210. See also Test. John H. Gates, Rec., p. 30). Gates purchased all of lot 2 in 1885 (see link 6, Chain of Title, Rec., p. 53). It was assessed in his name until 1890,

and he paid taxes upon it (Simmons Dep., Rec., p. 43) and he had possession (Gates' Ev., Rec., p. 30).

Gates says it was always known as Goldberg's property (Rec., p. 31); and he always occupied it (Rec., p. 31). "Father did not build stable;" "I can state *from my own* personal knowledge: The stable has been on the lot ten years" (Rec., p. 33).

So when Shappirio went to look at the property it was all occupied as one place, yet the defendants appellees in their answer, under oath, say:

> "These defendants deny that the said part of lot 2 was always used and occupied by the defendant, George Goldberg, as part of said premises No. 1247."

This allegation is wholly false, and why it was made I cannot understand, for it is admitted by both of them in their evidence that it was occupied by Goldberg or his tenant from 1893 to 1901. John H. Gates, the son of the former owner of the possessory title, says:

> "It was occupied by Goldberg from the time his father sold it to him until Mr. Goldberg sold it" (Rec., p. 31).

Nally, Goldberg's tenant, says Goldberg occupied the premises ever since he moved out in 1895 (Rec., p. 24).

Issac Roginsky, Mrs. Goldberg's brother, says while Goldberg lived there he used the stable for the storage of different things (Rec., p. 120).

Mrs. Goldberg went to live in the property, 1247 Eleventh street in 1896, and a couple of years after that Goldberg told her he did not own the stable and lot upon which it stood. That Goldberg was allowed to use it by Gates (Rec., p. 218). Goldberg says that it was always occupied by him after he got it from Gates. Such being the case their

answer stands as having been knowingly falsified. Both of them in their answer say positively that Shappirio was told at the time of the sale that this piece of ground did not belong to Goldberg. *"Note this part of answer."*

> **"The said George Goldberg, prior to June 5, distinctly told said Jacob I. Shappirio that he, the said George Goldberg, did not own the stable on said lot 2 nor the land upon which said stable stood"** (Par. 4 of answer).

Yet, in his evidence (Rec., p. 202), he says he—

> "made no statements to Richold or Shappirio in regard to whether or not the stable in rear of 1247 belonged to that property or to me." "The question was not asked, there was nothing said about the stables or anything else."

On page 204 he says:

> "In fact I never had any conversation of any kind about the stables. I never had any conversation whatever with Richold or Shappirio, prior to the sale, regarding the ownership of the stable in rear of 1247" (Rec., p. 205).

I deem this sufficient to show, at least, that the Court must look with suspicion upon the evidence and statements of the appellees, but later I believe it will be made to appear that the evidence of both of them is without credence.

The Defendants Made False Representations and Purposely Allowed the Appellants to be Deceived.

Mary Shappirio says personally she took no part in the buying of the property and knows nothing but what she was told by her husband and did not read the deed (Rec., p. 13).

Richold says Goldberg gave him the property to sell a month prior to May 11th (Rec., p. 60).

Prior to May 11th he and Shappirio went to look at the property. "Yes, we looked at it before. I think it was the Sunday morning" (Rec., p. 14). He said to Goldberg, "Be kind enough to show Shappirio the property, which he did."

They went out into the back yard of 1247 and he left them standing talking, while he went to urinate in the stable and they were standing there when he came back. "They were standing right in the yard of 1247" (Rec., p. 14).

Richold says, referring to his first part of the transaction: "I did so with the understanding that there was no trick behind it" (Rec., p. 15).

Learned of property not being included in deed five or six months after sale, when he, Goldberg, called my attention to the water closet.

> "It looked like an excuse to call my attention to the small piece of ground.
>
> "Goldberg said 'here is a small piece of ground that belongs to me.'
>
> "I thought just about that time if the ground would open I would go down at such a deception (Rec., p. 15).
>
> "Death sweat came right out on me when he told me how he deceived him that way" (Rec., p. 16).

Cross-examination:

> "He gave me the property to sell a month prior to May 11th," (Rec., p. 60). "I was not the agent of Shappirio" (Rec., p. 60).
>
> "I thought an honest man would sell the whole."
>
> "I could not sell it unless he was satisfied" (Rec., p. 61).
>
> "I never knew there was any trick about it and wish to God I never had anything to do with it" (Rec., p. 61).

"If I was dying I wouldn't say anything different" (Rec., p. 61).

"Well, let me tell you, you have this property to sell; you take me out into the yard, and why, if you are an honest man, don't you come up and say this is the only ground, only to here? Why don't you say so and don't mislead me or anyone else with any trickery behind it?" (Rec., p. 62).

"When told to sell I understood him very plain, I will sell you the whole business with improvements thereon and I never investigated" (Rec., p. 62).

"Yes, he deceived me" (Rec., p. 63).

"Called me back to see water closet; that was only an excuse" (Rec., p. 63). Produced old book showing how property was described when given to him (Rec., foot pp. 64 and 65).

"I took it the way he told me; did not know stable stood on lot 2" (Rec., p. 65).

"If you can't trust a man, you had as well be dead" (Rec., p. 65).

"I thought Goldberg honest and did not look any further" (Rec., p. 65).

"Only had title examined to see what trust was on it" (Rec., p. 66).

"I thought it such cheating I did not like to tell Shappirio" (Rec., p. 67).

"Goldberg says this belongs to me, I can shut it off" (Rec., p. 67).

"Mrs. Goldberg was in store and remained until I left."

"No such conversation as only part of lot running back to alley ever took place at signing of contract" (Rec., p. 173).

Goldberg paid him $180 commission.

Shappirio paid him nothing (Rec., p. 67).

He did not tell Shappirio for eight or nine months what Goldberg said (Rec., p. 68).

"It was such a deceit, such a deception I did not know what to say" (Rec., p. 68).

"When told to sell property of that kind I do not ask if this or that belongs to it" (Rec., p. 69).

"Goldberg never said the stable did not belong to him and I never gave it the least consideration." "I thought he sold the whole business." "I thought it was all in there what was there" (Rec., p. 15). "I went on May 11th and submitted Shappirio's offer of $6,000; Goldberg accepted and gave me authority to sell it" (Rec., p. 14). "I asked him size of lot and he said 34x80 to alley with improvements thereon and gave me authority to sell" (Rec., p. 48).

Jacob I. Shappirio says:

Richold came to him and offered the property for $7,000.

He took Galloway, the builder, to see it, to advise him of its value. Goldberg introduced them to his brother-in-law, Isaac Roginski; he took them through into the yard of 1247 and told his brother-in-law to show them through the property. Thought the stable and everything belonged to it (Rec., p. 16).

Roginski took them from the yard of 1247 out into the alley, where he saw a goat they had at back of stable (Rec., p. 16).

"He took us first into the stable of 1247 (property in dispute) through the alley into stable of 1245, a much smaller stable" (Rec., p. 17).

"**And I even spoke to Mr. Goldberg at the time, saying, that if at any time I wanted to build a stable I could make one stable out of the two which would make a decent stable out of it, etc.** I told him I would see Mr. Richold and I guessed would finish out the sale" (Rec., p. 17).

"He pointed it out (the stable) himself as well as his brother-in-law" (Rec., p. 17).

"I left the examination of papers or title to Richold (Rec., p. 17). I had no reason to disbelieve Goldberg or that he would defraud me" (Rec., p. 17).

"Only read the description of the amount of indebtedness in deed of trust; that was the only thing that I cared to look at (Rec., p. 17). He said, 'take him through and show him all the grounds and stables;' he was standing in door of kitchen (Rec., p. 79).

"Had no suspicion (Rec., pp. 17 and 18).

"And had no reason to suspect him (Rec., p. 17).

"Depended solely on Richold for examination of title (Rec. p. 17), but not for quantity.

"*Did not know anything definite until I saw the fence* (Rec., p. 20).

That was after Goldberg had moved out, about four days before the bill was filed.

"Went to see Goldberg after fence was there, but did not see him; saw brother-in-law; did not think it worth while to talk to him" (Rec., p. 21).

Cross-examination:

I did not know condition until Mr. Goldberg moved out (Rec., p. 84).

"Roginsky said Shappirio bought lot in front and sister has him behind" (Rec., p. 84).

I consulted Bigelow only a short time before I saw Mr. Simmons (Rec., p. 85).

When Richold told me what Goldberg said, he did not tell me the ground did not belong to me, only that it was not included in the deed (*Rec., p. 85*). The fact of the land being omitted from the deed, and that of the appellants tenant claiming title by grant of it are separate propositions; the latter at least required a lawyer's investigation.

Thomas F. Galloway says:

Goldberg told his brother-in-law to show them the property. "You take Mr. Shappirio out and show him the prop-

erty." Mr. Goldberg went back to the rear door and Mr. Goldberg's brother-in-law went out in the rear with us, and he carried us out and showed us the property, and among other things showed us stable on said lot (1247).

> "He said look out for the bulldog, don't get too close to the stable or the dog might bite you."

He had a lot of chickens and ducks all around there and showed us the entrance to the property and carried us to the north lot and said the stable on that did not amount to very much, but would do in a case of emergency to keep a wagon or something of that kind.

> "He explained the whole thing to us and practically told Mr. Shappirio in my presence that both of those stables belonged to the property he was buying."
>
> "Mr. Goldberg stood in the south door of the little frame building on the north side of the north house, while his brother-in-law showed us the stables and what improvements were on the property" (Rec., p. 20). "All the back yards are in one; that's my recollection of it" (Rec., p. 27).

Witness points out place upon photograph Exhibit E where a dog was standing and stables they looked at (Rec., p. 27).

Mr. Fields, the attorney for the appellees, produced the brother of Isaac Roginski, to see if the witness Galloway would say he was the person referred to as having shown the property, and he said he was not the person (Rec., p. 94).

The one who did was produced and he recognized him (Rec., p. 176). Says that the first time he went to see the property was when it was shown by Ike Roginski. "It was before the sale" (Rec., p. 176). When shown the property

he went through 1247, through stable off 1247 into alley back of 1247.

When he and Shappirio went to look at the property they were shown through all of it (Rec., p. 29) notwithstanding Goldberg's sworn statement (par. 5 off answer Rec., 8) the appellees do not pretend, in their testimony, that Shappirio was told that the small piece of land in question did not belong to the premises No. 1247. It is said by Goldberg that nothing was said about it. Goldberg says:

> "In fact I never had any conversation whatever with Shappirio about the stable or about the erection of a new stable. I never had any conversation with him in that respect at all (Rec., p. 204), and I never told Richold I had two stables. I never mentioned the stables to him when he came there with Shappirio on Sunday. I never had any conversation whatever with Richold or Shappirio prior to the sale regarding the ownership of the stable in rear of No. 1247."

This is an admitted fraud. Yet in his answer Goldberg says positively he did inform Shappirio that the back yard did not belong to the property.

The Taking of a Deed to the Back Yard Was a Part of the Scheme to Defraud.

When Goldberg committed this fraud, the damage resulting therefrom placed him in the position of debtor to the appellant Mary A. Shappirio and under such a condition it was incumbent upon the wife, claiming in opposition to the creditor of the husband, to show by proof unequivocally, that the property had been paid for from her own means, **even if she were not a party to the fraud.**

> "In a contest between the creditors of the husband and wife, there is and there should be a presumption against her, which she must overcome by affirmative

proof. In the case of purchase after marriage the burden is upon the wife to prove distinctly that she paid for it, viz., the property purchased by her with funds not furnished by her husband."

Seitz *vs.* Mitchell, 94 U. S., 580, and cases cited.

Goldberg paid Darby for his claim to the small piece of property and put it in his wife's name to defraud complainant.

Clark says he had often talked with Goldberg and tried to sell the piece of property to him for the last ten years (Rec., p. 166).

"Several years ago I called to see him about sale of lot while he was on 11th street and he talked about price of the lot and the surrounding ground being sold at 15 cents per foot.

"Saying he did not see why he should pay more than that" (Rec., p. 166).

Soloman Lewis, Goldberg's brother-in-law, offered him (Clark) 25 cents per foot for Goldberg before it was sold (Rec., p. 168).

Goldberg stopped him on the street half a dozen times to talk about purchase of lot (Rec., p. 168).

Says, in his opinion, the property is worth only about 10 cents per foot, if not taken in connection with the other lots (Rec., p. 169).

And considered it almost invaluable to the property fronting on Eleventh street (1247) (Rec., p. 170).

He considered it of great value to the (1247) Goldberg property, but of small value to front of lot 2 (Rec., p. 171).

Witness **Darby,** who claimed the record title to the small piece of land, says:

Goldberg negotiated for the sale of the piece of land and first called to see him about it several years ago.

"He had been talking about it some time" (Rec., p. 21). In August, 1900 (three months after sale) Goldberg paid a

deposit of $20 in cash, and in October paid $200. Mrs. Goldberg's name was not mentioned until he was closing up the matter.

> "He said I was charging him an outrageous price for it. He made several offers much below $300. I know the first offer was nothing like what I got for it" (Rec., p. 22).

Said he thought $300 an exorbitant price; never had any other offer for it from any one else, and never offered it to any one else (Rec., p. 55). The piece of property he considered a key to whole or necessarily belonging to the Eleventh street property (Rec., p. 56). Goldberg said he did not know Darby personally until this business transaction (Rec., p. 206). Yet Darby says he had been talking about it for some time, several years before the sale (Rec., p. 21). Was positive of more than a year (Rec., p. 21). Though Goldberg says the transaction only lasted three days (Rec., p. 206), and he saw Darby only once (Rec., p. 211).

Lewis, Goldberg's brother-in-law, says he talked with Goldberg and his wife about the property before Darby made the deed to Mrs. Goldberg.

That Goldberg sent him to see Darby and told him to offer anything from $150 to $200 for it; that he wrote Darby as requested (Rec., pp. 187–190).

Yet both of said defendants say positively that they never talked about it to any one, excepting Clark, prior to the time it was bought (Rec., pp. 207, 211 and 222), and never made an offer for it.

The tale of Mrs. Goldberg, that it was her money that paid Darby, is not true.

Goldberg says he never saw her have a cent.

> "She had no business of her own" (Rec., p. 212).

"She told me to go and buy it, there was a rumor among the neighbors that the front part vas going to be sold" (Rec., p. 212).

The front part of lot two was owned by Louis Goldberg, the appellee George Goldberg's brother, who says he never offered his property for sale and did not authorize any one to do so (Rec., p. 157). He says he always pays his debts, only had a small mortgage upon his place (lots one and front part of two). "It never was for sale. Has owned it since 1895." "Never heard a rumor about it being for sale; if it was for sale I ought to know it" (Rec., p. 158).

Solomon Lewis says the firm of Roginski & Lewis existed for about ten years and ceased in 1894 or 1895 (Rec., p. 110). (Mrs. Goldberg's employment ceased in April, 1893.)

Does not know what Mrs. Goldberg received while employed (Rec., p. 110).

"Her brother furnished her silks." "I do not mean that" (Rec., p. 110)

Cannot say that she had any money (Rec., p. 114).

When Lewis Roginski left Washington he left creditors (Rec., p. 115).

I do not know whether she had a dollar or not when she married Goldberg (Rec., p. 116).

Minnie D. Goldberg says she began working as a cash girl at Baum's at $2 per week when she was fourteen years old (Rec., p. 222); and was raised gradually until she received $5 per week; that was in 1887. Says when she left Baum's she had about $200. When she left there she remained home about a year. Then went to work for Lansburgh Brothers (Rec., p. 217). Lansburgh's books show she began work in November, 1889, at $5 per week (Rec., p. 195).

In September following 1890 her pay was increased to $6 per week; and on December 19, 1891, she received an increase to $7 per week, and continued at that until April 1, 1893, when her employment ceased (Rec., p. 195). When she left Lansburgh's, she says, she had $600 or $700. Of that amount she had $500 left when she married Goldberg in September, 1896 (Rec., p. 217), **(though he never saw her have a cent).**

> **"Have some left now. He did not give any money to me, never at all** (Rec., p. 217). I sent Goldberg to buy the piece of ground because I was sick at the time."

This would indicate Lewis, her brother-in-law, had nothing to do with the purchase.

> "After I bought this piece of property I made arrangements to prepare myself to buy the front part of lot 2 when sold, by joining the Equitable Building Association. No part of the money which I have paid into the building association has been received by me directly or indirectly from my husband" (Rec., p. 217).

She began to pay into the building association November 13, 1900, and up to the time she was testifying had paid twelve installments of $12.50 each (Rec., p. 224). $150 00

Said she still had several hundred dollars	
Say (Rec., p. 223)	200 00
She paid for the lot	300 00
$30.50 for certificate of title and $5 for survey	35 50
Total accounted for (Rec., p. 152)	$685 50

So, according to her story none of this amount was given to her and she had but $500 in September, 1896, and "*spent some of that occasionally for different things,*" and made none

after that date. *How did the remainder of the $500 she had in 1896 increase to $680.50 in September, 1900?*

To say a girl 14 years old, by working as cash girl and clerk and whose family of nine or ten people who lived over a paint shop, in five rooms (Ike Roginski's Test., Rec., p. 127), while supported by a brother, a mechanic, who often had to borrow money to make ends meet (Yudelevitz Test., Rec., 171), would in a few years save $600 or $700, is so improbable and unusual it is scarcely creditable. But when she says she kept this money for seven years to invest in the back part of a lot because she heard **"rumors"** from customers coming in the store that the front was to be sold (Rec., p. 222), as she says, is so frail a story it cannot be believed. It is evident that this small piece of land was purchased with the intention to defraud Mrs. Shappirio, otherwise the sum of $300 would never have been paid for it.

Witness **Donohue** says—

"That lot is worth about $30 or $40 and is of no use excepting to owner of front lot" (Rec., p. 36).

"I place that value upon it to an outsider" (Rec., p. 37).

"To take it away from 1247 Eleventh street would cause large damage. I could not say how much" (Rec., p. 37).

"The small piece of ground is not worth $300. If it was sold for that I would say that the purchaser meant to get $100 or $200 out of some one else" (Rec,, p. 38).

"He never gave that for it for himself" (Rec., p. 38).

"Front ground on N street is only worth 25 cents per foot" (Rec., p. 39). "If such a piece of property was offered at auction there would be no one at the sale (to bid)" (Rec., p. 39).

"The small piece of ground is worth a great deal more to Eleventh street property than to any other."

Explains why it is worth more to Eleventh street than to N street (Rec., p. 39).

Witness **Aukam** says:

"That the piece of lot to itself has no value excepting as part of yard to 1247; would be great damage to cut it off" (Rec., p. 44).

"Situation as to lot 2, on N street, is not near so critical as Eleventh street" (Rec., p. 44).

"Lot 2 has an abundance of room" (Rec., p. 44).

"Its position is one that is very damaging if taken away from 1247."

No offer was made to contradict these witnesses, who are experts.

Goldberg says himself that the price paid was outrageous (Darby Tes., Rec., p. 22). Darby, the seller of the property, says that the price was exorbitant; that he never had an offer from any one else for it. Clark says that it is worth about 10 cents per foot (Rec., p. 169).

The witness **Isaac Roginski,** the brother of the defendant, Minnie D. Goldberg, cannot be relied upon any more than the defendants can. Referring to the time Goldberg gave Richold authority to sell the property, he says (Rec., p. 118).

"Q. What, if anything, was said by Goldberg about the dimensions of the property?

"A. While Mr. Richold was reading the paper, Mr. Goldberg made the remark 'Stop;' he said one lot don't run back as far as the other.

"Q. Was anything said about only part of the lot running back to the alley?

"A. **No sir.**

"Q. Did Goldberg say that the whole of the lot ran back to an alley?

"A. **No sir, only a part of the lot.**"

On page 130 he said he knew the date the paper—authority to sell—was signed. That Richold and Shapirio called on the Sunday before the paper was signed.

> ' That was the first time I ever saw him. The next time he came it was on Friday.
> "Q. You are positive it was Friday?
> "A. Yes; I know it was Friday. I always know when it is Friday."

He could not remember any other day or what he had done any other day. Said no one had talked with him about the date, and he had not examined the paper, yet he was positive it was Friday.

> "Q. How did you know his name (Richold's)?
> "A. I heard Mr. Goldberg call him by name.
> "Q. What date was that?
> "A. Friday.
> "Q. That was on Friday?
> "A. Yes.
> "Q. **Was that the first time you saw him?**
> "A. **Yes**" (Rec., p. 132).

He first said he saw Richold and Shappirio on the Sunday before, and that was the first time he saw him (Rec., p. 130).

On page 130 he said nothing was said about only part of the lot running back to alley, and afterwards he says (Rec., p. 133), Goldberg told Richold only part of lot ran back to alley, etc.

> "Q. How long was she (Mrs. Goldberg) there at the time the contract was signed?
> "A. A few minutes, she just came in and signed it, stayed there a few minutes then went out.
> "Q. And went right out?
> "A. And went right out."

Says the suit was not mentioned to him and he never talked about it (Rec., p. 130).

Says that photograph, Exhibit E, does not represent back part of house (Rec., p. 135).

Never saw Galloway in his life (Rec., p. 136).

Never was any dog kept there (Rec., p. 137).

Could open stable door from alley (Rec., p. 139).

Never did know that Goldberg did not own all the property (Rec., p. 139).

Says Goldberg told Richold that he did not own it (Rec., p. 139).

He first said, nothing whatever was said about it.

See conflicting statements of what was said to Richold about stables (Rec., p. 143).

The Court should not only look with suspicion upon the evidence the appellees, George Goldberg and his wife aforesaid, and that of the brother-in-law, Isaac Roginski, but should disregard such altogether.

Falsus in uno falsus in omnibus.

The question of the goat and dog being about the premises was not material, and no attention would have been paid to same, excepting for the fact that the attorney for the appellees attempted to rebut the evidence of Shappirio and Galloway, in which they referred to said animals by showing that no such animals were owned or kept by the appellees about the premises. If they will tell a deliberate falsehood about such an immaterial matter, what will they do as to material matters?

Goldberg says he knows nothing about said animals being about the place (Orig. Dep., p. 107).

("Don't know if we had a dog in the yard or not.")

Mrs. Goldberg says (direct ev.): "I don't remember if we had a goat there at the time of sale" (Rec., p. 215).

"I don't remember if we had a dog there at time of sale" (Rec., p. 218).

Cross-examination :

"I don't know anything about a dog there in May, 1900."

"I had the goat long before my first child was born and have not had a goat since" (Rec., p. 220).

"My living child is twenty-one months old. She was born January 1st, 1900" (Rec., p. 220).

So it was fully three years after her first child was born when the sale was made, and she could not have been mistaken as to the time these animals were there.

Her brother (Isaac Roginski), attempting to corroborate this falsehood, says :

"There was no dog there in the yard of the houses in question. There was no dog on premises" (Rec., p. 136).

Emphasizes the statement that there was no dog and he did not show the property (Rec., p. 137).

It is clearly shown that these statements are false. Both Galloway and Shappirio say they saw these animals at the place at the time the sale was made, and their neighbors say :

Abe Sakolski, who lived there in one of Goldberg's houses (1245), says he saw a dog and goat in the yard. A year prior to Goldberg's leaving, dog and goat were both there (Rec., p. 159).

Isaac Sakolski, who lived next door to 1245, often saw Goldberg and his brother-in-law tying goat in alley (Rec., p. 163).

"Dog was there all the time and goat from the time of birth of second child" (Rec., p. 163).

States who goat was bought from and in whose possession it was left when they moved away in 1901 (~~Rec., p. 16~~).

Saw both dog and goat in yard many a time (Rec., p. 164).

Points and Authorities.

The back yard and stable was an appurtenant to the house
Manogue *vs.* Bryant, 15 Appeals, D. C., 245.
Sheppard *vs.* Pepper, 133 U. S., 706.

If Goldberg did not own the small piece of land *and did not intend it should be* so understood it was his duty to disclose the fact and state that it would not be included in the sale.

While it is clear that the property in dispute is an appurtenant and a part of the property, and that Goldberg did represent it to be a part of that which he proposed to sell, yet if he did not, as he claims, it was his duty to state distinctly that it did not, and if he failed to do so, there being nothing to indicate to the contrary, it was absolute fraud on his part. Mrs. Goldberg is a party to this fraud and aided her husband in the practice of it and is chargeable as well as he.

Lincoln *vs.* Claflin, 7 Wall. 132.

"In a court of conscience, deliberate concealment is equivalent to deliberate falsehood."
Crosby *vs.* Buchanan, 23 Wall., 454.
Kerr on Frauds and Mistakes, 101.

"Deliberate concealment is deliberate fraud."
Henderson *vs.* Henshaw, 54 Fed. Rep., 320.
Tyler *vs.* Savage, 143 U. S., 77.

In the last named case the court cites the case of Stewart *vs.* Cattle Ranch Co., 128 U. S., 383, in which the following instruction was held properly given:

"If the jury find that Stuart (vendor) purposely kept silent when he should have spoken and informed Clay (vendee) of material facts, or find that by any

language or acts he intentionally misled Clay about the number of cattle in herd or the number of calves branded in 1882, or by any acts or expressions, or by silence consciously misled or deceived Clay, or permitted him to be misled or deceived, then the jury will be justified in finding that Stuart made material misrepresentations and must find for the plaintiff."

See cases cited in above case.

See also Smith *vs.* Richards, 13 Peter (U. S.) 26.

"*It (misrepresentation) may consist of conduct alone or external acts when through this means it is intended to convey the impression or produce the conviction that some facts exist and such result is a natural consequence.*"

Pomeroy Eqt. Sec. 877.

Tyler *vs.* Savage, 143, 77.

"The design will be viewed from the natural and necessary consequences. It is not necessary that all the representations by which a party is induced to act should be true. The cases hold that where certain statements have been made, all in their nature capable, more or less, of leading the party to whom they are addressed to adopt a particular term of conduct and any one of them is untrue, the whole contract or other transaction is considered as having been obtained fraudulently."

Pom. Eqt., 880.

"A man to whom a representation is made has a right to rely upon it and need not make further inquiry."

Kerr on Frauds and M., 80, 81.
Lowe *vs.* Truesdal, 78 Va., 68.
Mead *vs.* Bunn, 32 N. Y., 275.
David *vs.* Park, 103 Mass., 501.

"The fact that he has the means of knowing or obtaining information of the truth, which he did not use is not sufficient. It is not indeed enough that he may have been wanting in caution. A man who had

made false representations, by which he has induced another to enter into a transaction, can not turn upon the person he has defrauded and say that he ought to have been more prudent and not to have concluded the representations to be true in the sense which the language used in the prospectus naturally and fairly imports."

Kerr on F. and M., 79 and 80.

"The effect of what would be otherwise noticed may be destroyed, not only by actual misrepresentations, but by anything calculated to deceive or even to lull suspicion upon a particular point."

Kerr on F. and M., 81.

"The maxim caveat emptor does not apply when there is a positive misrepresentation, essentially material to the subject in question, provided proper diligence be used by the purchaser in the course of the transaction. The rule at least of caveat emptor, where there is a misrepresentation, if applicable at all, must be applied with great care. Nor will a condition in the particulars of a sale, that misdescription or errors in sale, shall not annul the sale, cover a fraudulent misrepresentation."

Kerr on F. and M., 81, 82.

The Appellants Have Not in Any Way Waived Their Rights; the Suit was Filed Within One Month After the Fraud Was Fully Known to Them.

A person upon whom fraud has been practiced has a right to understand all the facts and circumstances and be fully advised of his rights before beginning suit, especially if no rights of third parties have intervened.

Dickson *vs.* Patterson, 160, U. S. 586.

And see especially, Pence *vs.* Langdon, 99 U. S., 578.

The court will see from the conduct of the appellees in relation to this transaction that the above scheme was pre-

mediated and carefully considered with the object to either force the appellants to buy said small piece of land at a large advance, or to force them to sell the property at a sacrifice. The statement that it was purchased with a view of buying the front part of lot 2 upon "**rumors**" that it was to be sold, is ridiculous to say the least.

The appellees contend that the appellants did not use reasonable diligence upon discovery of fraud; certainly if reasonable diligence was not used in this case the limit would be made short indeed, for it clearly appears that the suit was filed in less than one week after the parties were fully advised. The case of Pence *vs.* Langdon, 99 U. S., 578, is especially applicable to this state of facts.

Shappirio says he did not know the exact state of affairs until he discovered the fence after Goldberg moved out, May 6th, and the suit was filed on the 10th day of the same month.

But if it be contended that he knew the condition six months or a year earlier he would have been in time.

> "Reasonable diligence is of course essential to invoke the activity of the court, but what constitutes such diligence depends upon the facts of the particular case.
>
> "When a party injured by fraud is in ignorance of its existence, the duty to commence proceedings arises only upon discovery and mere submission to an injury after the act inflicting it is completed, can not, in the absence of other circumstances take away the right of action."
>
> Kilborne *vs.* Sunderland, 130 U. S., 505.
> Kerr on Fraud & M., 305.
> Pence *vs.* Langdon, *supra.*
>
> "A party is entitled to wait a reasonable time after the discovery of a fraud before bringing suit to rescind."
>
> Gallinger *vs.* Newell, 9 Ind., 572.
> Tyler *vs.* Savage, 143 U. S., 77.

The above Indiana case was referred to in the case of Nesbett *vs.* McFarland, 92 U. S., 101, where the Court said:

> **"The party is not bound to rescind until the elapse of a reasonable time after discovering the fraud, and hence can not be placed in statu quo.**
>
> **"Parties engaged in a fraudulent attempt to obtain a neighbor's property are not the objects of special solicitude of the courts.**
>
> **"If they are caught in their own toils they are themselves the sufferers, it is a legitimate consequence of their violation of the rules of law and morality. Those who violate these laws must suffer the penalty."**

See, also, Morston *vs.* Simpson, 54 Cal., 190, where the Court held that suit brought six months after discovery of fraud was ample time.

Richold was Goldberg's agent, he being employed by him.

Story on Agency, 9th Ed., 31.

The Title Being in Mrs. Goldberg Makes no Difference Even if She Were Not a Party to the Fraud.

> "It is no objection to specify enforcement of a contract to convey land that the legal title is not held by a party to the contract, where such a person is party to the suit and it appears that he holds the title in trust for the vendor."
>
> McDonald *vs.* Youngblood, 46 Fed. Rep., 45.

But Mrs. Goldberg was a party to this contract, for she signed the paper authorizing the agent to sell.

> "Where one who agrees to sell certain land receives the full consideration therefor and then fraudulently gave a deed conveying only part of the land a specific enforcement of the contract may be had in equity even though the contract be oral."
>
> McDonald *vs.* Youngblood, *supra.*

"Where the parties stand upon the land they are bargaining for and examine same, and it is marked by fences five feet high and other monuments; and a deed is made conveying more than the land inclosed and viewed, even if both parties mutually understood and believed the property described in the deed is a correct description, the court will require the grantee to reconvey so such or such part as was not within the inclosed lines."

Good *vs.* Rieley, 153 Mass., 585.

A fortiori when the one who made the deed knew at the time he was practicing a fraud and not giving what the purchaser supposed he was buying.

The appllees pretended below that Shappirio had exercised ownership over the property to such an extent he had waived his right as aforesaid, and one of the grounds for this is the statement of the witness Galloway, that he had made certain repairs. The Court will see that nothing was done but to clear out the store and do a small amount of papering.

"I sent the man down there to do repairs in the way of papering and things of that kind, that is the way I discovered the fence" (Rec., pp. 92, 93).

This is the only intimation that any repairs were made after Goldberg moved out, and this was when the workmen were sent to make such repairs and discovered the fence.

Besides, these small improvements were a benefit to the property and the appellees have no right to complain about this and contend that they cannot be placed in *statu quo*.

Neblett *vs.* McFarland, *supra*.

It was said in Coffee *vs.* Ruffin, 4 Cald. (Tenn.), 487.

"That the rule that a contract cannot be rescinded unless the parties can be placed in *statu quo* does not

apply where one party has obtained advantage over the other by means of fraud, and such rescission would further the ends of justice, and the court can still reach and enforce equities between them; or if fraud or the act of the parties prevent such placing in *statu quo.*"

"Likewise, where a party who wishes to rescind a contract restores or offers to restore what he has received under the contract without unreasonable delay, the fact that the other party by his default renders full restoration impossible will not defeat the former's right to rescind."

Hammond *vs.* Pennock, 61 N. Y., 145.

A party practicing a fraud may be required by bill in equity to do what he agreed to do. If he cannot, the contract will be rescinded.

Kerr on Frauds and M., 333.

The appellees contend that by the evidence of said Galloway it is shown that changes were made in the property, and they take this from what is said on page 89 of the Record. But the evidence there did not relate to this property. If such were the case it could have been fully established by the witness on further cross-examination. The attorney for the appellees knew that if he had asked the specific questions, what had been done, it would have been shown that what was done was only to clear out the place and patch up the paper which amounted to a few dollars. If such a change was made in the property it is incumbent upon the party practicing the fraud to show it. His attorney could not do so and only left the record in this way hoping to draw an inference from such statement that some great change had taken place.

"Where the conduct of the defendants has not been such as to commend them to the favor of the court of equity, any doubt and difficulty should be resolved against them."

Providence Rubber Co. *vs.* Goodyear Rubber Co., 9 Wall., U. S., 788.

The evidence shows that the appellees have made false statements: First, about the building of the stable; second, about the occupancy of the yard and stable; third, about the fact of Goldberg having said to Shappirio that the small piece of land and stable did not belong to him; and fourth, about the corroborative evidence in relation to the animals not being about the premises, at the time of the negotiation of the sale; and fifth, about Mrs. Goldberg having paid for the small piece of land with her own funds: **Each and every one of which was absolutely false. Some admitted so and others proven so beyond doubt.**

The decree below should be reversed and the case remanded with directions to enter a decree for the enforcement of the contract as originally made. If not the contract should be rescinded as prayed in the alternative.

The following authorities, among others, are cited in the brief and principally relied upon in support of appellant's contention:

For what constitutes fraud and misrepresentation, see:

Crosby *vs.* Buchanan, 23 Wall., 454.
Stewart *vs.* Cattle Ranch Co., 128 U. S., 383.
Tyler *vs.* Savage, 143 U. S., 77.
Smith *vs.* Richards, 13 Pet., 26.
Henderson *vs.* Henshaw, 54 Fed. Rep., 320.
Kerr on Fraud and Mistake, 81, 101.
Pomeroy Eqt., Sec. 877, 880.
Good *vs.* Riely, 153 Mass., 585.

On question as to what time action should be begun, see:

Dickerson *vs.* Patterson, 160 U. S., 586.
Pence *vs.* Langdon, 99 U. S., 578.
Kilborn *vs.* Sunderland, 130 U. S., 505.
Kerr on Fraud and Mistake, 305.
Nesbit *vs.* McFarland, 92 U. S., 77.
Tyler *vs.* Savage, 143 U. S., 77.
Gallinger *vs.* Newell, 9 Ind., 572.
Morston *vs.* Simpson, 54 Cal., 190.

Respectfully submitted,

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